BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFF C. WORF	)	
Claimant	)	
	)	
VS.	)	
	)	
MASTEC, INC.	)	
Respondent	)	Docket No. 1,030,733
	)	
AND	)	
	)	
ACE AMERICAN INSURANCE CO	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 17, 2006 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant failed to establish that he sustained an accidental injury arising out of and in the course of his employment with the respondent. Rather, that claimant "injured his back during the non-work related incident on July 3, 2006."[1] Accordingly, claimant's request for benefits was denied.

The claimant requests review of this decision and asserts the ALJ "exceeded his jurisdiction by denying all benefits in determining the [c]laimant did not sustain his burden of proof relative to an accident at work on June 7, 2006 or suffer aggravation, acceleration and intensification on each and every workday through August 2, 2006."[2]

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[1] ALJ Order (Oct. 17, 2006).

[2] Application for Review at 1 (filed Oct. 20, 2006).

Respondent requests that the Board affirm the ALJ's Order in all respects. Respondent contends claimant failed to establish that he sustained a compensable injury on June 7, 2006 while working or that he timely notified respondent of such an injury. Rather, respondent contends claimant injured his back in an unrelated event at home on July 3, 2006. Finally, respondent argues that claimant's work activities in the weeks after that June 7, 2006 alleged accident do not constitute an aggravation and do not entitle him to compensation under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The ALJ succinctly and accurately summarized the evidence in this claim as follows:

> The [c]laimant stepped in a hole at work on June 7, 2006. This accident was reported[3] but no injuries were a result of this accident and the [c]laimant had no pain.
>
> The [c]laimant was juggling croquet balls in his front yard on July 3, 2006, when he suffered pain in his leg. An MRI revealed degenerative disc disease at L4-L5 with a large disc herniation to the left at L5-S1 obliterating the neural foramen.[4]

The ALJ went on to deny claimant all benefits as he concluded claimant failed to establish a compensable injury.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

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[3] Respondent denies that this accident was reported, but for purposes of the Board's decision at this juncture of the claim, this is irrelevant.

[4] ALJ Order (Oct. 17, 2006).

[5] K.S.A. 2005 Supp. 44-501(a).

[6] K.S.A. 2005 Supp. 44-508(g).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.[7]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

The ALJ concluded that claimant sustained and reported his June 7, 2006 injury. On that date, claimant stepped in a hole while working at his distant job site in Madison, South Dakota. Claimant testified he had no pain as a result of this accident. He did not seek treatment and continued to work his normal work duties until July 2, 2006, when he left his work site and traveled home for a long holiday weekend.

On July 3, 2006, claimant was entertaining family and was juggling croquet balls. As he bent down to pick up a ball, he felt a "pop" and pain in his low back. When the pain did not resolve over the next few hours and days he sought medical treatment from a chiropractor. In spite of this condition, claimant returned to work for respondent on July 9, 2006 and according to him, continued to perform his regular duties up until August 2, 2006.[11]

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[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

[8] K.S.A. 2005 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[10] *Id.*

[11] P.H. Trans. at 26-27.

When claimant returned to Kansas he again sought treatment from the chiropractor, who recommended an MRI. When the MRI revealed a ruptured or herniated disc, he referred claimant to Dr. Matthew Henry, and orthopaedist. Dr. Henry saw claimant on August 21, 2006. Following an examination, Dr. Henry gave claimant a partial release to return to work that day.

According to claimant, the first time he linked up his back pain with work was when he spoke to Dr. Henry at his initial visit on the 21st of August. But Dr. Henry's records do not reflect a reference to a work-related injury. Rather, Dr. Henry's records mention the juggling incident. And claimant admits that Dr. Henry told him it was "dumb luck", and that he "could have ruptured it [his back] in your sleep, rolling over in your sleep."[12]

Up to this point in his visit with Dr. Henry, claimant had maintained that his back problems were not work related. He repeatedly told Mel Svoboda and Kevin Werner that he hurt himself while at home and not at work. He was placed on a leave of absence so that he could obtain medical treatment, but he remained employed.

On August 21, 2006, when claimant received a partial release to return to work, he contacted respondent and was told he would have to talk to human resources. When he did so, he was advised that they could not accept his release given the type of work they had available. In late August, 2006, claimant initiated this claim and alleged a series of accidents commencing June 7, 2006 and continuing to August 2, 2006.

When presented with this evidence, the ALJ denied claimant's request and found that while claimant sustained an accident on June 7, 2006 and gave notice of that accident, he suffered no injury. He admitted he had no pain following the accident and that he sought no medical treatment. He continued his work duties until July 2, 2006 when he left South Dakota to return home. While in Kansas he was juggling croquet balls and injured his back. Unlike the June accident, this accident caused him immediate pain and compelled him to seek treatment. He repeatedly told his employer that his back injury was due to an event that occurred while he was at home and according to respondent's managerial employees, no mention was made of the June 7, 2006 accident until late in August 2006. Clearly the ALJ was more persuaded by the testimony offered by respondent's managerial employees over that offered by the claimant.

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. This Board Member concludes that some

[12] *Id.* at 37.

deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

This Member is likewise not persuaded by claimant's reference to *Boeckmann*.[13] The *Boeckmann* Court held there must be a causal relationship between the work activities and the aggravation for the aggravation to be compensable. Under these facts, this Board Member (like the ALJ) believes the evidence does not establish that the work activities have caused any worsening of his physical condition. Rather, it was the unrelated event on July 3, 2006 which gave rise to claimant's acute low back complaints and radiating pain into his leg. That event led to his need for chiropractic treatment and to his subsequent diagnosis of a herniated disc. While claimant may have returned to work on July 9, 2006 and worked until August 2, 2006, this Board Member is not persuaded that those work activities worsened his condition. According to claimant, during the time after his July 3, 2006 accident *everything* but lying on his back caused him pain.[14] For these reasons, this Board Member finds that the ALJ's preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated October 17, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Vince Burnett/Dallas Rakestraw, Attorneys for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

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[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[14] P.H. Trans. at 36.

[15] K.S.A. 44-534a.